

JOHN W. ROTH

IBLA 71-162

Decided October 11, 1972

Appeal from decision of Alaska state office canceling homestead entry A-060907.

Affirmed.

Alaska: Homesteads--Homesteads (Ordinary): Final Proof--Res Judicata--Rules of Practice: Appeals: Generally

Where no appeal is taken from a decision canceling a homestead entry for failure to submit final proof at the expiration of the term of the entry, and final proof is submitted six years subsequent to such decision, res judicata and the doctrine of finality of administrative action bar further consideration of the case when an appeal is taken from a decision rejecting final proof.

Rules of Practice: Appeals: Generally

A case is considered closed when no appeal is taken within the time permitted by the regulations.

APPEARANCES: John W. Roth, pro se.

OPINION BY MR. STUEBING

John W. Roth appeals from a decision of the Alaska state office rejecting Roth's final proof for a homestead entry filed under the authority of the Homestead Act, 43 U.S.C. §§ 270, 161 et seq. (1970). The land office rejected the final proof because it was not filed within the five-year period allowed by the statute and because the final proof was unacceptable on its face.

Roth filed his application for homestead entry on April 24, 1958, for 24.31 acres of surveyed land situated on Glacier Point, about 18 miles south of Haines, Alaska. The Bureau of Land Management allowed the entry on April 27, 1959. Roth established actual residence on the site on June 1, 1959.

On January 24, 1964, the Bureau of Land Management notified appellant that his entry would expire on April 26, 1964, and that failure to submit final proof within the five years allowed by statute would result in cancellation of the homestead. Receiving no response, the Bureau of Land Management issued a decision on July 22, 1964, canceling the entry because he had failed to submit final proof within the time required by statute. This decision was sent by certified mail and delivery is evinced by a signed returned receipt card of August 3, 1964. Roth did not appeal this decision within the time provided by the regulations.

On July 27, 1970, more than six years after the entry was canceled, Roth filed a final proof which was rejected by the land office on December 10, 1970. On January 11, 1971, Roth filed this appeal.

Establishing and maintaining residence on the entry is an integral part of the Homestead Act. See 43 U.S.C. § 164 (1970). An essential element of residence is the intent of the applicant to make the entered land his permanent home. See United States v. Lloyd W. Booth, 76 I.D. 73 (1969). The evidence in this case indicates that Roth abandoned his entry and moved to Arizona, and that he did not return to the homestead, at least until long after the statutory life of the entry had expired. 43 CFR 2511.4-2(e)(1) permits the entryman to be absent from the homestead for a period of five months each entry year provided he notifies the land office prior to such absence and upon termination of such absence. There is no record in the case file indicating that appellant notified the land office of this departure or made any explanation for such departure at the time.

Regarding final proof, 43 CFR 2511.3-4(a)(1) prescribes that the entryman submit final proof within the five-year statutory life of the entry. Since the life of Roth's entry expired on April 26, 1964, and Roth had not submitted final proof, the land office properly canceled the entry on July 22, 1964. 1/

43 CFR 4.411(a) sets a mandatory time limit of thirty days, reckoned from the date of service of the decision from which the appeal is taken, upon the party appealing, in which a party may file an appeal. 43 CFR 4.411(b) states that no extension of time

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1/ On May 13, 1964, the state office notified Roth that the time allowed for final proof had expired. In this notice, the state office gave Roth thirty days to submit final proof or show cause why the entry should not be canceled for failure to submit final proof within the time required.

will be granted for the filing of a notice of appeal. 2/ The case will be considered closed if the notice of appeal is not filed within the time set forth in the regulation.

In order to achieve orderliness in the administration of public lands, res judicata and its administrative counterpart, the doctrine of finality of administrative action, bar further consideration of cases that have been closed and have not been appealed or otherwise attacked. Union Oil Company of California et al., 71 I.D. 169 (1964); John G. and Zilpha L. Wenzel et al., A-30616 (December 1, 1966); Gabbs Exploration Company, 67 I.D. 160 (1960), aff'd. Gabbs Exploration Company v. Udall, 315 F.2d 37 (D.C. Cir. 1963), cert. denied 375 U.S. 822 (1963). The regulations provided Roth with an opportunity to appeal from the decision of July 22, 1964, canceling his entry, but he failed to do so. Roth cannot circumvent the regulation prescribing a time limit for appeal and expect to revive his case by filing final proof more than six years after it was due and appealing from a decision rejecting that final proof. The decision of July 22, 1964, canceling the entry constituted the Department's final action on his case. The decision of December 10, 1970, rejecting Roth's final proof was an administrative formality, affording Roth no new rights to the canceled homestead entry. See United States v. J. S. Devenny, 3 IBLA 185 (1971).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision of the land office is affirmed.

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Edward W. Stuebing, Member

We concur:

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Newton Frishberg, Chairman

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Joseph W. Goss, Member

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2/ In the decision canceling the entry, the Bureau notified Roth that strict compliance with the regulations would be required in filing an appeal.

